Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COLORADO-UTE ELECTRIC ASSOCIATION, INC., *et al.*,
Appellants,

v.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF COLORADO, *et al.*,
Appellees.

On Appeal from the Supreme Court of Colorado

JURISDICTIONAL STATEMENT

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December 14, 1988

QUESTIONS PRESENTED

1. Whether the Colorado Public Utilities Commission's (PUC) interference with the wholesale rate design of Colorado-Ute Electric Association, a rural electric cooperative transmitting electricity in interstate commerce, was constitutionally permissible in light of the Commerce Clause of Article I, § 8, cl. 3 of the United States Constitution, the Supremacy Clause of Article VI, cl. 2 and the regulatory role of the Rural Electrification Administration.

2. Did the PUC violate Colorado-Ute's and the Members' right to due process, under the Fifth and Fourteenth Amendments, in admitting into evidence over their objection, pivotal testimony about the results of a computer analysis, while denying them any opportunity to examine the computer program itself, the supporting documentation, and supporting data which generated those results?

LIST OF PARTIES AND AFFILIATES

The appellants are Colorado-Ute Electric Association, Inc., (Colorado-Ute) and 13 of its 14 members. The appellants not listed in the caption are as follows: Delta-Montrose Electric Association; Grand Valley Rural Power Lines, Inc.; Gunnison County Electric Association, Inc.; Holy Cross Electric Association, Inc.; Intermountain Rural Electric Association; La Plata Electric Association, Inc.; Sangre de Cristo Electric Association, Inc.; San Isabel Electric Association, Inc.; San Luis Valley Rural Electric Cooperative, Inc.; San Miguel Power Association, Inc.; Southeast Colorado Power Association; White River Electric Association, Inc.; and Yampa Valley Electric Association, Inc.

In addition to the parties set forth above, the parties below were: The Public Utilities Commission of the State of Colorado; Atlantic Richfield Company; Exxon Corporation; Shell Western E&P, Inc.

Empire Electric Association, also a member of Colorado-Ute appeared below aligned with Colorado-Ute. Empire has not joined as an appellant in this Court.

Colorado-Ute and its 14 members are affiliated. There are no other companies or entities with which the appellants are affiliated.

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JURISDICTIONAL STATEMENT

Colorado-Ute Electric Association, Inc. (Colorado-Ute) and thirteen of its member systems (Members), the appellants, appeal from the final judgment of the Supreme Court of Colorado, dated August 15, 1988, denying appellants' petitions for rehearing, thereby confirming its previous opinion dated July 11, 1988, upholding the orders of the PUC requiring Colorado-Ute to implement a seasonally-differentiated demand-energy rate. In so holding, the court rejected appellants' arguments that the PUC orders were constitutionally

impermissible under the Commerce, Supremacy, and Due Process Clauses of the United States Constitution.

OPINIONS BELOW

The opinion of the Colorado Supreme Court which appears in the appendix hereto, page A-1, is reported at 760 P.2d 627 (Colo. 1988). The decision of the Montrose County District Court is reported at 74 PUR 4th 224 (1986). The decision of the PUC is reprinted at 55 PUR 4th 331 (1983). The other PUC decisions are not reported. The reported decisions, as well as the other decisions of the PUC, are reprinted in the appendix hereto, page A-70 and following.

JURISDICTION

The judgment of the Colorado Supreme Court affirming in part and reversing in part the decision of the Montrose County District Court was entered on July 11, 1988. Petitions for rehearing were filed by Colorado-Ute and the Members on July 25, 1988. See page A-162 below. The petitions were denied on August 15, 1988. See page A-152 of the appendix hereto.

A Notice of Appeal was timely filed in the Colorado Supreme Court on November 1, 1988. It is reprinted in the appendix hereto, page A-155. Colorado-Ute and the Members sought and were granted an extension of time until December 14, 1988 to file in this Court.

This Court has jurisdiction to review the judgment of the Colorado Supreme Court under 28 U.S.C. § 1257(2). For jurisdictional purposes, this Court may consider a state public utilities commission's order to be a statute under 28 U.S.C. § 1257. *Atchison, Topeka & S.F.R. Co. v. Public Util. Comm'n,*

346 U.S. 346 (1953). It is clear that Colorado law treats PUC ratemaking decisions as legislative acts as well. *Colorado-Ute Electric Association, Inc. v. Public Util. Comm'n of Colorado*, 198 Colo. 534, 602 P.2d 861 (Colo. 1979).

Jurisdiction is invoked under former 28 U.S.C. § 1257(2) which remains applicable to this appeal pursuant to § 7 of the Act of June 27, 1988, 102 Stat. 664, P.L. 100-352, which provides, among other things, that the amendments made by such Act shall take effect 90 days after the date of enactment and further provides that such amendments shall not affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date. This provision is applicable in this case since the judgment was entered on July 11, 1988. Alternatively, this Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES

U.S. Const. art. I, § 8, cl. 3:

The congress shall have power . . . To regulate commerce with foreign nations, and among the several states . . . .

U.S. Const. art. VI, cl. 2:

This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . .

U.S. Const. amend. V:

No person shall be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV:

No state shall make or enforce any law which . . . shall deprive any person of life, liberty or property without due process of law . . . .

HOW THE FEDERAL QUESTION WAS RAISED

This appeal concerns the lawfulness of certain orders of the PUC. These orders were based on a computerized analysis of the existing and future Colorado-Ute system. The analysis was prepared by the PUC staff using a proprietary program which, despite Colorado-Ute's objections, was never provided to Colorado-Ute.

The orders required Colorado-Ute to implement a seasonally-differentiated demand-energy rate in place of the flat energy rate agreed to by Colorado-Ute and the Members and incorporated in the all-requirements contracts between Colorado-Ute and the Members which were approved by the Rural Electrification Administration (REA).

During the proceedings before the PUC, Colorado-Ute specifically moved to have the computer program declared inadmissible. In addition, Intermountain Rural Electric Association, one of the Members, moved to dismiss the case for lack of jurisdiction, arguing that the PUC had no authority to regulate a rural electric cooperative operating in interstate commerce. In the Applications for Rehearing, Reargument, or Reconsideration filed by Colorado-Ute and the Members before the PUC, these issues as well as federal questions concerning unlawful confiscation of property, deprivation of due process, impairment of contract and violation of the Commerce and

Supremacy Clauses were raised. The PUC expressly rejected the arguments made by Colorado-Ute and the Members regarding these federal questions.

Colorado-Ute next asserted these issues in its Petition for Writ of Certiorari before the Montrose County District Court. The district court ruled in favor of Colorado-Ute and the Members, setting aside the order of the PUC though rejecting arguments of Colorado-Ute and the Members concerning the PUC's deprivation of due process.

On appeal to the Colorado Supreme Court, neither Colorado-Ute nor the Members, as the prevailing parties below, had any need to revisit the federal issues. Obviously, there was no reason, under the circumstances, to file a cross-appeal; therefore, in their arguments before the Colorado Supreme Court, Colorado-Ute and the Members responded only to the arguments raised by their opponents.

Upon the announcement of the Opinion of the Colorado Supreme Court reversing in part the Montrose District Court, Colorado-Ute and the Members filed petitions for rehearing raising the federal issues argued below. The petitions for rehearing are reproduced in the Appendix hereto, beginning at page A-162. Following review of the petitions for rehearing, the court denied them without opinion. It is clear that the court had ample opportunity to review the arguments concerning the federal questions raised by Colorado-Ute and the Members and its summary denial of the petitions constitutes a rejection thereof.

STATEMENT OF THE CASE

Colorado-Ute is a rural electric cooperative association engaged in the generation, transmission and sale at wholesale of electric energy to its members, 14 distribution electric cooperatives that are also its owners. Colorado-Ute is incorporated as a cooperative association under the laws of the State of Colorado and is operated under its bylaws on a not-for-profit basis. Colorado-Ute's Board of Directors is composed of 28 persons, each of Colorado-Ute's 14 member/owners designating two directors.

Colorado-Ute obtains the bulk of its power from power plants in Colorado owned by itself or jointly with other utilities that are based both inside and outside the State of Colorado. Colorado-Ute does, however, purchase some power on a regular basis from utilities that are located in states other than Colorado, e.g., Utah, New Mexico and Arizona.

The Members, all of which are also cooperative rural electric associations, purchase power from Colorado-Ute at wholesale under an "all requirements" contract and resell it at retail to their members who are the ultimate consumers. Some of Colorado-Ute's members have certificated territory in states other than Colorado, namely, Utah, Wyoming and New Mexico.

In addition to sales to its members, Colorado-Ute sells electricity at wholesale to utilities located in states other than Colorado, e.g., California, Arizona, New Mexico, Utah, etc. Currently, on a year-to-date basis, surplus sales outside the State of Colorado make up approximately 26% of Colorado-Ute's total sales.

Colorado-Ute is a member of the Inland Power Pool[1] and is connected to multistate grids, so that it is capable of transmitting or receiving power across state lines. In addition, Colorado-Ute regularly exchanges power with the federal government through the Western Area Power Administration.

In December 1981, Colorado-Ute filed Advice Letter No. 45 with the Colorado Public Utilities Commission (PUC) seeking a rate increase of approximately 12%. (A-9). At the time of that filing, Colorado-Ute's pricing scheme was on a "flat" or "all-energy" basis.[2] This pricing method had previously been approved by the PUC in February 1981, only ten months earlier. (A-10).

Although none of Colorado-Ute's customers nor anyone else had complained about the proposed rate, the PUC opened a case to investigate the requested increase. Twelve Colorado-Ute members intervened in this case as well as others, including certain oil companies. The oil companies presumably intervened since a demand-energy rate would tend to benefit high load-factor customers like themselves whose average cost

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[1] The Inland Power Pool is a power pool consisting of 15 utilities in five states (Colorado, New Mexico, Arizona, Utah and Wyoming), the members of which regularly exchange power and energy and reserve capacity, primarily for reliability purposes.

[2] As described by the Colorado Supreme Court, "[t]he flat or all-energy rate does not differentiate between 'demand' charges (fixed capital costs associated with the generation and transmission of electricity) and 'energy' charges (variable operation and maintenance expenses, especially fuel costs). Instead, it recovers all costs -- both demand and energy -- from a uniform charge per kilowatt hour (kwh)." (A-48, n.1).

per kilowatt-hour would be lowered. Any such lowered costs to the oil companies would necessarily result in other rural electric customers paying more for their electric service.

Pursuant to Colorado law, the rates filed became effective on January 14, 1982. C.R.S. § 40-6-111(4)(a). Following public hearings, the PUC entered its order approving the level of revenue requested by Colorado-Ute but disapproving the continued use of the flat rate, ordering Colorado-Ute to file a seasonally-differentiated demand-energy rate instead. (A-73). The PUC additionally allocated over $24 million in generation fixed or demand costs to the energy component of the demand-energy rate design. (A-11).

Colorado-Ute and the Members filed various applications for rehearing claiming, among other things, that the order of the PUC was preempted by the Rural Electrification Act and was an impermissible burden on interstate commerce; that the PUC's failure to provide Colorado-Ute with the program used to produce the cost-of-service study was a deprivation of due process and that the PUC's order was confiscatory and in violation of the U.S. and Colorado Constitutions.

These motions were, in all respects material to this appeal, denied. Colorado-Ute and the Members thereafter sought review in the Montrose County District Court pursuant to C.R.S. § 40-6-115, raising, among others, the same federal issues. The district court set aside that part of the PUC decision that required the filing of a new demand-energy rate as well as the portion concerning the reallocation. (A-12).

On appeal, the Colorado Supreme Court reversed the district court as to the PUC's authority to order the implementation of the demand-energy rate but upheld the district court's order concerning the reallocation. (A-47). In the

Supreme Court, neither Colorado-Ute nor the Members explicitly raised the issues presented in the district court concerning preemption, Commerce Clause, confiscation, or deprivation of due process. Having prevailed in the district court, Colorado-Ute and the Members had no basis to assert these claims on appeal; rather, Colorado-Ute defended the relevant portions of the district court opinion and answered the arguments presented by the appellants below.

Upon the publication of the Opinion of the Colorado Supreme Court, Colorado-Ute and the Members filed petitions for rehearing raising the constitutional claims. (A-162). The Supreme Court denied the petitions without opinion, thereby rejecting the constitutional claims.

THE QUESTION IS SUBSTANTIAL

I.

This case involves important issues concerning the extent to which states, through public utility commissions, may, consistent with the Commerce Clause, regulate rural electric cooperatives engaged in interstate commerce. There are currently approximately 62 rural electric cooperatives, that are either direct borrowers from the Rural Electrification Administration (REA) or beneficiaries of an REA guarantee and thus subject to REA regulation, operating as wholesale suppliers in interstate commerce.

In numerous states the public utility commission has asserted jurisdiction over generation and transmission cooperatives such as Colorado-Ute notwithstanding that these utilities may be engaged in interstate commerce. Given the state of the law as most recently enunciated in *Ark. Elec.*

Coop. v. Ark. Pub Serv. Comm'n., 461 U.S. 375 (1983) and particularly in light of the expansive scope of regulation asserted by the PUC in this case as well as recent policy changes by the REA, this case presents an opportunity for this Court to refine *Arkansas Electric*.

In *Arkansas Electric*, this Court was faced with a challenge by a rural electric cooperative utility to the attempted assertion of jurisdiction by a state public utilities commission over sales at wholesale in interstate commerce. Unlike the instant case, the challenge in *Arkansas Electric supra*, was a generic one, not concerning any specific rate order, merely contesting the right of the commission to assert any jurisdiction over the utility whatsoever.

In substance, this Court held that state regulation was not necessarily preempted and was not otherwise prohibited under the Commerce or Supremacy Clauses; states could regulate rural cooperatives so long as such regulation did not impermissibly impact interstate commerce or impair important federal interests.

What is important, however, and what needs to be addressed in this case is what the Court did not delineate in *Arkansas Electric*, namely the bounds of permissible regulation of rural electric cooperatives by state utility commissions. Due to this absence of authority, there is a substantial issue among the utility commissions of various states as to what are permissible subjects of state regulation. This expanded assertion of regulatory authority by utility commissions may have a significant adverse impact on interstate commerce and, in cases such as the instant one, may impair the cooperative's ability to repay the federal government.

In *Arkansas Electric*, this Court dispensed with the bright line previously utilized by this Court in determining whether public utilities in interstate commerce were subject to state or federal regulation.[3] In doing so, however, it left an ambiguity in the regulatory scheme.[4] It is precisely this ambiguity which needs clarification by this Court.

It is clear that the Congress intended wholesale rates of electricity in interstate commerce to be outside the realm of state regulation. 16 U.S.C. § 824(b); *see also Arkansas Electric, supra,* 461 U.S. at 396, (White, J., dissenting); *but see Arkansas Electric, supra,* 461 U.S. at 384.

Yet, notwithstanding congressional intent, rural electric cooperatives which are clearly engaged in interstate commerce have been made subject to state regulation in large part due to the fact that the Federal Energy Regulatory Commission (FERC) has declined to take jurisdiction. *See generally Dairyland Power Cooperative,* 37 FPC 12, 67 PUR 3d 340 (1967). The facts of this case as well as certain events that have occurred since the decision in *Arkansas Electric*, however, demonstrate that a further elaboration of *Arkansas Electric* is necessary.

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[3] *See generally Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company,* 273 U.S. 83 (1927).

[4] As stated in *Arkansas Electric*, "a particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of the AECC to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act." 461 U.S. at 389. It is submitted by Colorado-Ute that this language invites disputes and provides little guidance in determining jurisdiction in a particular case.

In *Arkansas Electric* this Court stated as follows:

> There may come a time when the REA changes its present policy, and announces that state rate regulation of rural power cooperatives is inconsistent with federal policy. If that were to happen, and if such a rule was valid under the Rural Electrification Act, it would of course pre-empt any further exercise of jurisdiction by the Arkansas PSC.

461 U.S. at 388-89. The REA has, in fact, altered its policy taking a significantly more active role in the regulation of rural electric cooperatives. In a letter sent recently to Wabash Valley Power Association, Inc., an REA cooperative engaged in the transmission of electricity at wholesale in interstate commerce, the REA stated in part as follows:

> [W]e notify you that the REA hereby exercises jurisdiction over the rates charged by Wabash. Thus, the Indiana Commission and the Michigan Commission are no longer entitled to serve as regulatory authorities whose approval must be obtained for changes in Wabash's rates.[5]

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[5] Letter dated November 23, 1988 to Edward P. Martin, General Manager, Wabash Valley Power Association, Inc., from Jack Van Mark, Acting Administrator, REA. Copies of this letter were sent to the Indiana Utility Regulatory Commission and the Michigan Public Service Commission.

This is not the first time that the REA has asserted its authority vis-a-vis a state regulatory commission. On April 9, 1987, the REA notified Big Rivers Electric Corporation that, due to the refusal of the Kentucky Public Service Commission to permit Big Rivers a modest rate increase, it intended to " . . . suspend all loan and loan guarantee approvals and advances on loans and loan guarantees already approved to all electric and telephone borrowers in Kentucky."[6]

These actions clearly demonstrate a more proactive REA policy toward rate regulation of electric cooperatives. Given these recent actions, it is clear the REA has engaged in both direct and "inferred" preemption.[7] The adoption of this policy has created difficulties for rural electric cooperatives that are caught in the middle of this federal-state conflict; if they

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[6] Letter dated April 9, 1987 to Richard D. Heman, Chairman Kentucky Public Service Commission from Harold V. Hunter, Administrator of the REA.

[7] The REA has always had serious concerns about state regulation of the rates of rural electric cooperatives. As stated in the amicus brief of the United States filed in *Arkansas Electric*, 461 U.S. at 385:

> The spectre of state regulation poses a threat to the REA loan because of the possibility that the state may refuse to permit its cooperatives to pay a generation and transmission association the rates to which they agreed and upon the security of which the loan was issued. . . *If the state were to insist on a restructuring of the generation and transmission association's rate structure, the policies of the Act would be undermined. (Emphasis added).*

comply with the federal mandate they may be in violation of state regulations and, if not, they may be subject to federal sanctions. This Court now has the opportunity to untangle the federal-state dispute with respect to electric cooperatives.

Notwithstanding the foregoing, the conclusion in *Arkansas Electric* that state commissions are not explicitly preempted from regulating rural cooperatives is not determinative. *Arkansas Electric* also held that a particular rate set by a regulatory commission "may so seriously compromise important federal interests, including the ability of the AECC to repay its loans, as to be implicitly pre-empted by the Rural Electrification Act." 461 U.S. at 389. That the level of state regulation of Colorado-Ute in this case creates a burden on interstate commerce and an impairment of important federal interests is demonstrated by a review of the facts.

In connection with its request for a rate increase, Colorado-Ute sought to continue the utilization of the flat rate design which had been approved by the PUC only ten months previous. The rate had been determined by Colorado-Ute management to be necessary and appropriate to the continuance of reliable service to Colorado-Ute's customers at economically competitive rates while simultaneously generating sufficient revenue to pay its obligations, including those to the federal government.

The flat rate selected by Colorado-Ute was endorsed by 100% of Colorado-Ute's customers. Moreover, it was incorporated into Colorado-Ute's "all requirements" contracts with each of its members. Although approving the amount of the rate increase as reasonable, the PUC nevertheless ordered Colorado-Ute to implement a seasonally-differentiated demand-energy rate.

The implementation of the PUC-ordered rate design will severely compromise Colorado-Ute's financial situation and consequently its ability to repay the federal government. In the PUC proceedings, there was uncontroverted testimony by Colorado-Ute that the seasonally-differentiated demand-energy rate favored by the PUC staff would produce severe revenue instability.[8] Further there was testimony that even the PUC staff believed that the demand charge would depress total peak demand. This would have the inevitable effect of reducing Colorado-Ute's revenues further, requiring additional rate increases merely to attain revenue levels approved by the PUC in this case.[9]

The flat energy rate favored by Colorado-Ute and its 14 members, the only customers affected, was selected in large part because of its simplicity and predictability. The flat rate also contributed to the goal of rate stability embarked upon by Colorado-Ute and its members. A return to the demand-energy rate and the attendant cash flow problems it engenders in the

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[8] This problem is exacerbated because the PUC rate would collect a much higher demand charge in the winter when Colorado-Ute's costs are lower and reduce the charge in the summer when Colorado-Ute's costs are higher.

[9] It should be noted that the PUC did not even make an express finding that the demand-energy rate would generate sufficient income to meet Colorado-Ute's revenue requirements.

Members would create a significant impact on interstate commerce.[10]

The rate increases and revenue instability referred to above, would seriously threaten the ability of Colorado-Ute and its members to repay their REA debts and to effectively compete in interstate commerce.[11] Under these circumstances, the PUC does not have the right, in accordance with *Arkansas Electric*, to impose its wishes on Colorado-Ute against its will and that of 100% of its members.

Finally, the order of the PUC goes beyond the mere setting of revenue level -- it asserts control over Colorado-Ute's rate design thereby intruding into the day-to-day operation of the

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[10] For example, a single cold day on the last day of the month could drastically increase the monthly demand charge to a member, notwithstanding no correlative increase in the amount of energy sold.

[11] The PUC-ordered demand-energy rate will have additional impacts on interstate commerce. For example, it will impair Colorado-Ute's ability to continue to offer lower interruptible rates, which have been effective in, among other things, retaining customers such as irrigators who might otherwise abandon the rural electric system altogether. To maintain such rates in the face of a demand-energy rate requires the installation of expensive metering, communications equipment and computer software to be able to accurately ascertain the total peak coincident demand of each Colorado-Ute member. Simple kilowatt-hour metering is insufficient for this purpose. The demand-energy rate will also impair the ability of qualifying small power producers and cogenerators to interconnect and produce power in accordance with the policy set forth in the Public Utility Regulatory Policies Act (PURPA) 16 U.S.C. § 824a-3 et seq., as well as Colorado-Ute's ability to wheel power between utilities in interstate commerce.

company which, of necessity, must be reserved to management. It is clear that the PUC order in this case goes further than the mere assertion of jurisdiction found in *Arkansas Electric* and involves the type of regulation that will impact interstate commerce and impair federal interests. This level of regulation is repugnant to the Commerce Clause and should not be permitted by this Court.

II.

At the heart of due process of law is a sense of fundamental fairness. In this case, the PUC admitted testimony about the results of a computer program analysis and expert testimony based on that analysis, while denying Colorado-Ute and the Members access to the computer program itself, the supporting documentation and supporting data. Two of the PUC staff witnesses relied on a computer analysis which examined the potential benefits which "would" result from the use of demand-energy rates. That program consisted of seven modules which interacted in the program to create the analysis.

The PUC staff did give Colorado-Ute access to data summaries and a general description of the program, including the identification of each module. It did not provide access to the computer code, the program plan, the program manuals or the input and output modules. A staff witness testified that it would take four months to duplicate his analysis *if* Colorado-Ute had access to all of the information about the program. That complete access was denied. That procedure is patently unfair. As a result, Colorado-Ute and the Members were effectively denied any right to meaningful cross-examination or to rebut expert opinion, based on "scientific computer analyses".

Historically, procedural due process has not required the adherence to any rigidly prescribed procedure in all cases. Procedural due process rules are, however, determined by the risk of error in the truth finding process as applied to cases in general. *See, e.g., Walters v. Nat. Assn. of Radiation Survivors*, 473 U.S. 305 (1985). Those who are summoned before a governmental agency in a quasi-judicial proceeding, involving life, liberty or property, are entitled to be fairly apprised of the government's proposals and to be heard before a final decision is reached. *Morgan v. United States*, 304 U.S. 1, 18, 19 (1938).

Courts and administrative agencies are now being faced with a new type of evidence -- results of computer analyses and simulations. With the inevitable proliferation of computer technology, there is an increasing reliance on such evidence. Computers have an aura of science, of infallibility, and accuracy, untainted by human error. That perception is often transferred to the results of any computer analysis, even though there are fallible human elements in the programming, data entry and interpretation of the programming results. Despite the broad applicability and far-reaching implications of this issue, it has not been addressed by this Court.

Computers themselves do not offer testimony. Humans do. Those persons may or may not have written the computer program that performed the analysis. They may or may not have personally entered the programming code and input data into the computer. They may only know the results of the computer analysis. Courts and administrative agencies need general guidance on when and under what circumstances this form of evidence is to be received.

Due process and fundamental fairness dictate that this relatively-new type of evidence must be subject to the closest scrutiny. It is not enough to simply offer testimony that "the computer" generated the analysis. The risk of error in the truth-finding process is overwhelming. If the truth is being sought, then, testimony about the results of computer analyses, must be constrained.

Fundamental fairness, at a minimum, requires, that before such testimony is received, the opposing parties must have access to the computer programming code, any supporting data or manuals, the input data, the format of the results and that access must provide those parties with sufficient time to examine that data and to verify that the program performs as specified. If there is no such minimal due process, then analyses by computer rise to the level of gospel truth and opposing parties must accept the results on faith. This is the very result that the Fifth Amendment is designed to abrogate.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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